KANNAYAH MONNIL PILLAI & ANOR.

v.

LIAVITHY KATHAPERUMAL & ANOR.

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[ORIGINATING SUMMONS NO. 1013 OF 1985]
22 DECEMBER 1986

FAMILY LAW: *Guardianship and custody of infant - Whether paternal grandparents better placed than maternal grandmother - Guardianship of Infants Act 1961 - Section 11 - Civil Law Act 1956 - Section 27.*

This was an appeal against the award of guardianship and custody of an infant (whose parents had been killed in a motor accident) to its maternal grandmother against the rival claims of its paternal grandparents. The applicants contended that they were better placed than the 1st respondent to bring up the infant.

Held:

[1] The Court was required by s. 11 of the Guardianship of Infants Act 1961 to give primary regard to the welfare of the infant. Other factors which were to be taken into consideration, highlighted by s. 27 of the Civil Law Act 1956 included the religious upbringing of the child and the customs of the community to which the infant belonged.

[2] Both parties had similar levels of income although the 1st respondent's income was more reliable and regular. Further, both parties were able and willing to bring up the infant properly according to its parents' religion and customs.

[3] An emotional bond had already been formed which could not be broken by the Court's removal of the infant from the 1st respondent's care without there being an immediate disruption and negative effect upon the child.

[4] At the end of the case, the learned Judge had no doubt at all that the said infant should remain with the 1st respondent. He therefore dismissed the application of the applicants and instead, appointed the 1st respondent as the said infant's guardian with consequential custody to the 1st respondent, to whom he also awarded costs.

[Appeal dismissed with costs.]

Cases referred to:
Chuah Thye Peng v. Kuan Huah Ong [1978] 2 MLJ 220
In Re McGrath [1892] 1 Ch. 143

Legislation referred to:
Guardianship of Infants Act 1961, s. 11
Civil Law Act 1956, s. 27

For the applicants - S.A. Lingam; M/s. S.A. Lingam & Co.
For the respondents - H. Sankey; M/s. H.R. Sankey & Co.

JUDGMENT

Peh Swee Chin J:

This was a case of rival claims to the right for guardianship and custody of an infant presently aged about 3, not between his father and mother, but between his paternal grandparents, on the one side, (the applicants), and his maternal grandmother on the other side (the 1st respondent), the parents of the said infant having been killed in a motor accident.

The principles are well settled. First, s. 11 of the Guardianship of Infants Act 1961 provides as follows:

> Section 11. The Court or a Judge, in exercising the powers conferred by the foregoing provisions of this Act, shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

Secondly, although special weight must be given to the welfare of the infant, it does not mean other factors should be left out. Please see *Chuah Thye Peng v. Kuan Huah Ong* [1978] 2 MLJ 220, but those other factors usually, though not always, in my view, do revolve round the question of such welfare of the infant.

Thirdly, s. 27 of the Civil Law Act 1956 appears to highlight two of such other factors which have often been considered by the Courts whenever the same became relevant. The first of these two factors is the religious upbringing of the child, please see e.g. *In re McGrath* [1892] 1 Ch.143, and the second factor is the customs of the community to which the infant belongs, please see the case of *Chuah Thye Peng* (*supra*). The said s. 27 provides as follows:

> Section 27. In all cases relating to the custody and control of infants the law to be administered shall be the same as would have been administered in like cases in England at the date of the coming into force of this Ordinance, regard being had to the religion and customs of the parties concerned, unless other provision is or shall be made by any written law.

The parents of the infant were killed in a motor accident, and before the said accident, the said infant was left with the 1st respondent. The accident occurred on 15 March 1985 while the parents were going back from Johor Bahru to the house of 1st respondent in Taiping to fetch back the said infant who, because of the fatal accident to the said parents while on their way, has been with the 1st respondent ever since.

For the financial position, personal data, conditions of the homes of both parties, *viz.* the applicants of the one part, and the 1st respondent of the other, the welfare officer's report tendered in this case, should be more conveniently, if not more safely at the same time, referred to for consideration.

The 1st applicant, the paternal grandfather, was stated to be a pensioner, drawing a monthly pension of RM232.80, and in addition thereto, earning about RM600 per month for selling bread making about RM20 per day with the 2nd applicant, his wife, a mere housewife not earning any income at all. He paid RM200 p.m. towards the housing loan of RM30,000 taken on acquiring a double-storey terrace house with 5 bedrooms altogether in addition to kitchen, bathrooms etc. There were a T.V. set and a radio cassette in addition to furniture. A son aged about 22, single, a labourer earning about RM250 p.m., and a daughter aged about 20, single and unemployed, were staying with the applicants. It goes without saying that the said daughter was dependent on the applicants for support but would provide extra manpower for any additional work such as looking after the small child. By religion, the applicants were Hindus.

The 1st respondent lived in a rented house in Taiping, paying rent at RM100 p.m. Her husband did not live with her, he having married a Malay girl and having been converted into a Muslim, presumably, for the matrimonial purpose. The 1st respondent's husband did not divorce her and had in fact contributed RM100 p.m. for her upkeep, which would be just enough to pay her rent. She had however regular financial assistance from three brothers; each contributing RM200 p.m. The house was a wooden house with 4 bedrooms, in addition to a kitchen etc. with the usual water and electricity supply connected thereto. Furniture was simple, and the house was found to be quite clean. The 1st respondent had, staying with her, her own mother aged 60, and her own niece - a school girl. These two members of the household would have to depend on that sum of RM600 contributed by her brothers.

In addition to 1st respondent's affidavit and the applicant's affidavit, the husband of the 1st respondent also made an affidavit stating that he had not compelled 1st respondent to change her faith from Hinduism to that of Islam. He affirmed that he would allow the said infant to be brought up in the Hindu faith as it would have been the desire of the deceased parents of the said infant. He also made the allegation that the marriage of the said deceased parents was objected to throughout by the applicants, the same allegation having been made by the 1st respondent herself.

About the said infant, the welfare officer stated that the said infant was sleeping with the 1st respondent, and had been with the 1st respondent since 15 March 1985, the date of that fatal accident. The welfare officer saw one Mr. Peragaladum, a brother of the 1st respondent. This brother, a graduate teacher, stated that he would even pay the said infant's future expenses in university. The 1st respondent had opened two savings accounts, (particulars supplied), for the said infant, with the sums of RM274.50 and RM1602 standing in the credit of both accounts respectively as stated in the welfare officer's report dated 14 June 1986. In their conversation, the applicants had stated to the said welfare officer, and that they would pay for the said infant's education and that in future, presumably, (if the applicants died), the said infant would get one share of their property.

From her observation, the said welfare officer found that the said infant had been very well taken care of and that the relations between the said infant and the 1st respondent were close, and the said infant "had emotional attachment" for the 1st respondent. The 1st respondent had only one grandchild, i.e., the said infant and professed a tremendous affection for the said infant. Both applicants and the 1st respondent all hoped that they be granted custody of the said infant.

Learned Counsel for the applicants submitted to the effect as follows. They filed this application 6 months after the accident which took place on 15 March 1985, and therefore there was no delay for doing it. The maternal grandfather was a Muslim convert and not staying with the 1st respondent, the latter had no income of her own. 1st respondent received RM100 from her husband and the rent was also RM100. The 1st respondent could not claim any maintenance from her brothers. There was no father figure in the house. His client earned RM600 in addition to a pension of RM232.80 but the monthly instalment for the housing loan was RM200 p.m. His client had a house with plenty of space, T.V. set and 2 other children staying there. About the emotional attachment between 1st respondent and the child, the child would in due course adjust himself. He cited the case of *Chuah Thye Peng v. Kuan Huah Ong* (*supra*).

Learned Counsel for the 1st respondent submitted to the effect that the applicants had objected to the marriage and the relations between the parents of the said infant and the applicants were bad. The maternal grandfather, though a Muslim convert, did not oppose to

the said infant being brought up in the Hindu faith. If custody was granted to applicants, the said infant would be taken to strange surroundings. 1st respondent was financially sound equally with the applicants.

Learned Counsel for the applicants further submitted that the feeling of attachment of a child of tender age was transcient. There were 2 discrepancies, viz. the maternal grandfather had said, he married the Muslim girl in 1979 but the said welfare officer said it was 1972. He said he gave 1st respondent RM250 but 1st respondent said it was RM100 p.m.

In my view, the fact that the maternal grandfather had been converted to Islam, had proved to be a red herring. If he became a Muslim in 1972, (there was every reason to believe that such conversion was for the matrimonial purpose), he had done nothing since then to compel the 1st respondent to do the same up to the time of hearing of the instant application in 1986. There was equally every reason to believe that he would not do so in future. He said to the effect in his affidavit that the said infant would be brought up in the Hindu faith. The chances of his compelling the 1st respondent and the said infant to be converted to Islam, a religion different from that of the said infant's deceased parents were so remote as to count for nothing in the balance. It is interesting to observe that 1st respondent's husband wrote his name as Omar Krishnan bin Abdullah, because "Krishnan" is a Hindu name and not a family name like "Gandhi", a family name. Therefore his faith in Islamic religion was not of the kind that would make it likely for him to compel the 1st respondent and the said infant to become Muslims, with no guarantee, in any event, of success for such compulsion should it ever be carried out.

The case of *Chuah Thye Peng* cited by Counsel for the applicants would appear to show a case of similarly rival claims to a child between paternal grandparents of the one part and maternal grandmother of the other, and the Court after hearing the parties in that case had granted custody to the paternal grandparents against the maternal grandmother though the latter had *de facto* custody of the child.

Every case has its own facts, on the totality of which it is to be decided. The similarities between the instant case and *Chuah Thye Peng's* case would appear to be more apparent than real. The learned Judge in that cited case, in coming to his decision, had relied on the Chinese custom, after accepting the evidence of one Mr. Lee Siow Mong, who has been frequently called to give expert evidence on Chinese culture in our Courts. Mr. Lee had stated, *inter alia:* "It is the undisputed right of paternal grandparents under Chinese customary law to have the guardianship of the son of their deceased son." No allegation of similar custom was raised or proved in the instant proceedings. Further, the child's deceased mother in that case was only an adopted daughter of the maternal grandmother of the child. In the instant case, the deceased mother of the said infant was a natural daughter of the 1st respondent so as to make 1st respondent a blood relation of the said infant. Further the maternal grandmother in the cited case was a Christian while the paternal grandparents were Buddhists. The learned Judge in that case in which the religious upbringing of the child was debated, in coming to his decision had held that the paternal grandparents, being Buddhist, would be the more proper persons to bring up the child as a Buddhist as he thought this would have been the wish of the deceased parents of the child. In the instant case, the rival claimants were all Hindus so were the deceased parents of the said infant. The learned Judge in that cited case, felt that with those factors before the Court in the cited case, he had reached his decision by "no very great margin" after very anxious consideration, the factors being of course, the proved and accepted Chinese custom of priority to guardianship stated above, the question of religion set out above and similar financial background.

Financially, the applicants herein appeared to be more well-off than the 1st respondent; but this was an illusion brought about by the fact that the source of the income for 1st respondent was from her 3 brothers while the paternal grandfather earned his income himself. I did not think that the source of income should make any real difference so long there was the reliability or regularity of such source. After paying monthly instalment of RM200 towards the housing loan, the paternal grandfather had about RM623 to spare while 1st respondent, after paying her rent of RM100, would have about RM600. The regularity of contributions by the brothers to the household expenses of the 1st respondent, would be equally, if not more secure than the income of the paternal grandfather, who was for one thing, much older than the 3 brothers of the 1st respondent, and for another, it should not be lost sight of, that the mother of the three brothers of the 1st respondent and the 1st respondent were staying together so that the three brothers were also under a very strong, and additional moral obligation to make such contributions and hence the most likely regularity of such contributions.

The house of the applicants being a brick-house would normally be better than a plank-house of the 1st respondent. I did not think a young child, particularly a young child of such tender years as in this case, could really have such a subtle discriminative mind to appreciate that fact that a brick-house should provide more physical comfort or happiness. In this connection, the welfare officer had found the house of the 1st respondent to be clean. Was not such cleanliness a more relevant criterion?

Bearing in mind the principles mentioned earlier, I thought the most important evidence came from the welfare officer's report. Her report was scrupulously fair, to the point of being ambivalent, but in her careful comment, she found it necessary to state that she found the said infant and the 1st respondent to be very close with each other, with the said infant having "emotional attachment" for the 1st respondent, after saying earlier that the said infant had been well taken care of. The immediate effect of granting an order in favour of the applicants would without doubt, have an immediate and considerable disturbing and disruptive effect on the said infant whose emotional attachment for the 1st respondent, after more than one year's loving care from the 1st respondent, could not be likely to be transcient, should the said infant be forcibly removed from the 1st respondent.

To recapitulate, for reasons described earlier, the conversion of the husband to Islam, believed to be purely for matrimonial purpose, had no bearing in this case; the question of religion had posed no problem, neither the fact of a brick-house possessed by the applicants nor financial reasons could really in truth make the position of the applicants more superior than that of the 1st respondent, apart from the said emotional attachment and other matters to be further dealt with below.

There could be no doubt that it was for the good of the said infant of 3 years to be looked after by the 1st respondent, a woman in *loco matris*, while a father-figure, in the person of a grandfather, a man hawking his bread most of the time, would hardly be essential. I am referring to Counsel's submission of the lack of a father-figure for the said infant in the home of the 1st respondent.

The 1st respondent had become practically a grass widow with the husband taking another, presumably, younger wife with whom he had been staying. She had no child of her own living, as her own sole surviving child, the mother of the said infant, was killed in the accident. It would not be difficult to imagine that the thought that the said infant had become her only descendant living could be very often in her mind. Her virtual desertion by her husband

also must have intensified a great deal any feeling of affection towards the said infant, and the said infant must have gone a long way in filling the void in her life. All these reasons would, in my view, undoubtedly make the 1st respondent provide, for the infant, all the love and affection that the said infant's mother, had she been alive, would have given, if not much more. On this question of welfare for the said infant, after considering the corresponding conditions that obtained in the family of the applicants, in view of the reasons given above the 1st respondent had a much stronger case.

At the end of the case, I had no doubt at all that the said infant should remain with the 1st respondent. I therefore dismissed the application of the applicants and instead, appointed the 1st respondent as the said infant's guardian with consequential custody to the 1st respondent, to whom I also awarded costs.

Also found at [1987] 1 CLJ 200